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Everest Aisvaram Sdn Bhd v Majlis Bandaraya Shah Alam

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HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW APPLICATION NO BA-25–70–11 OF 2018
WONG KIAN KHEONG J
21 MAY 2020

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Civil Procedure — Judicial review — Application for — Respondent granted temporary license to applicant to operate ice-making factory — Respondent revoked temporary license due to leakage of ammonia gas in applicant's factory — Applicant applied for judicial review to quash decisions of respondent — Whether application for judicial review became academic because temporary license lapsed — Whether respondent lawfully exercised its discretionary powers — Whether there was procedural impropriety — Whether respondent's decisions irrational — Whether respondent acted in bad faith and/or malice — Whether court should exercise discretion to grant relief — Whether respondent was liable to pay damages to applicant — Evidence Act 1950 s 114(e) — Local Government Act 1976 ss 80, 81(a), 82(1) and 101(v) — Rules of Court 2012 O 53 r 5(1)(b) — Street, Drainage and Building Act 1974 ss 86(a), 87(1) & 95(2) — Town and Country Planning Act 1976 s 27(8)

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Evidence — Admissibility — Hearsay — Newspaper report — Failure to file affidavit of authoress regarding truth of contents — Whether report admissible — Rules of Court 2012 O 14 r 2(2), O 14 r 4(2), O 38 r 3(1), O 41 r 5(1) & (2)

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The respondent had granted a temporary license to the applicant to operate an ice-making factory at Lot 912A, Jalan Nagasari 36/10, Section 36, 40470 Shah Alam, Selangor Darul Ehsan ('the land'). On 13 August 2018, there was a leakage of ammonia gas at the applicant's factory ('the accident') which caused the death of two applicant's employees, endangered the lives of the residents and students, and polluted the environment ('the adverse effect'). Consequently, the respondent had directed the applicant to stop operation and to close the applicant's factory with immediate effect ('the respondent's direction') and vide a letter dated 17 August 2018, the respondent had also decided to revoke the temporary license with effect from the date of the said letter ('the respondent's first decision'). Further, the respondent had issued a notice in 'Form D' dated 29 August 2018 ('Form D') under the Town and Country Planning Act 1976 ('the TCPA') and Schedule 4 of the Planning Control (General) (Selangor) Rules 2001, to the land owner to reinstate the land to its original state so that the land could be used as required by the express condition. There was also a report in the *Star* newspaper on 27 September 2018 regarding this accident. The respondent had also rejected the applicant's appeal

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to, among others, operate the applicant's factory ('the respondent's second decision'). Aggrieved by the respondent's decisions, the applicant filed a judicial review application ('encl 21') for the following reliefs: (a) an order of certiorari to quash the respondent's decisions and Form D; (b) a declaration that the respondent's decisions were invalid; and (c) an order for the respondent to pay damages to the applicant. The issues raised were: (i) whether the *Star* newspaper publication constituted hearsay evidence which was inadmissible under O 41 r 5(1) of the Rules of Court 2012 ('the ROC'); (ii) whether encl 21 became purely academic as the temporary license had lapsed after 31 January 2019; (iii) whether the respondent's direction could be lawfully issued: (iv) whether Form D was valid; (v) whether respondent's decisions were lawful; (vi) whether there was procedural impropriety regarding the respondent's direction, the respondent's decisions and Form D; (vii) whether the respondent's decisions and Form D were irrational; (viii) whether the respondent acted in bad faith and/or malice; (ix) whether the court should exercise discretion to grant relief; and (x) whether the respondent was liable to pay damages to the applicant.

Held, dismissing encl 21 with costs:

(1) The applicant did not comply with the general rule laid down in O 41 r 5(1) of the ROC by not filing an affidavit by the authoress regarding the truth of the contents of the *Star* newspaper report. The report constituted documentary hearsay evidence. The four exceptions under O 14 r 2(2), O 14 r 4(2), O 38 r 3(1) and O 41 r 5(2) of the ROC did not apply to admit the *Star* newspaper report as evidence in this case. Accordingly, the court rejected the admissibility of the *Star* newspaper report even though the respondent had not objected to the admissibility of such evidence (see paras 26–27 & 69).

(2) The temporary license would have lapsed after 31 January 2019. Hence, encl 21 had become purely academic after 31 January 2019 as there was no 'actual controversy' between the applicant and respondent which would affect them in any way (see paras 32 & 69).

(3) The respondent had lawfully exercised its discretionary powers to: (a) make the respondent's direction under ss 86(a) and 87(1) of the Street, Drainage and Building Act 1974 ('the SDBA'); ss 80, 81(a), 82(1) and 101(v) of the Local Government Act 1976 ('the LGA'); and/or by-law 43(1)(b) of the Licensing of Trades, Businesses and Industries (Shah Alam City Council) By-Laws 2007 ('the by-laws'); (b) issue Form D pursuant to s 27(8) of the TCPA; and (c) make the respondent's decisions by virtue of ss 80 and 101(v) of the LGA; and/or by-law 10(1)(c) (see paras 39, 48, 50 & 69).

(4) As expressly stated in the temporary license, the respondent was entitled to revoke the temporary license at any time without giving any reason.

The respondent was therefore not obliged in law to give a right of hearing to the applicant before issuing the respondent's direction and respondent's first decision. With regards the second decision, the said decision was made after the respondent had considered three representations by the applicant, as such, there was no procedural impropriety regarding the respondent's second decision (see paras 52–53 & 69).

(5) The respondent's decisions and Form D were rational because: (a) the respondent's decisions and Form D had been made after the respondent had considered all relevant matters; (b) the respondent had not taken into account an irrelevant matter in the issuance of the respondent's decisions and Form D; and (c) the respondent's decisions and Form D were not so irrational and/or so unreasonable that no reasonable local authority would have ever issued (see paras 58–60 & 69).

(6) Bad faith and/or malice on the part of a public authority was not an independent ground for a judicial review of the public authority's decision but may support the judicial review of a public authority's decision on the ground of illegality and/or irrationality. By virtue of s 114(e) of the Evidence Act 1950 ('the EA'), the applicant had the legal burden to satisfy the court on a balance of probabilities that the respondent had acted in bad faith and/or with malice regarding the respondent's decisions and Form D. Based on the earlier findings of the court with regard to irrationality and illegality, the court was satisfied that the applicant had failed to discharge the legal onus to rebut the presumption under s 114(e) of the EA that the respondent had acted in bad faith and/or with malice in respect of the respondent's decisions and Form D (see paras 61–64 & 69).

(7) Even if it were assumed that there was illegality, procedural impropriety and/or irrationality in this case, the court would still not exercise its discretion to grant any relief for the following reasons: (a) the adverse effect; (b) the possible risk to public health and public safety of the applicant's employees, students and residents, and the environment; (c) the continuing breaches of the express condition; and (d) the offence under the TCPA (see paras 65 & 69).

(8) The respondent was not liable in damages to the applicant by reason of the immunity conferred on the respondent by s 95(2) of the SDBA; and by virtue of O 53 r 5(1)(b) of the ROC ie even if the applicant had claimed damages from the respondent in a suit, the court in the suit would not have ordered damages to be paid by the respondent to the applicant (see paras 66–69).

[Bahasa Malaysia summary

Responden telah memberikan lesen sementara kepada pemohon untuk mengendalikan kilang membuat ais di Lot 912A, Jalan Nagasari 36/10, Seksyen 36, 40470 Shah Alam, Selangor Darul Ehsan ('tanah tersebut'). Pada 13 Ogos 2018, berlaku kebocoran gas amonia di kilang pemohon ('kemalangan') yang menyebabkan kematian dua pekerja pemohon, membahayakan nyawa penduduk dan pelajar, dan mencemarkan alam sekitar ('kesan buruk'). Oleh itu, responden telah mengarahkan pemohon untuk menghentikan operasi dan menutup kilang pemohon dengan segera ('arahan responden') dan melalui surat bertarikh 17 Ogos 2018, responden juga telah memutuskan untuk membatalkan lesen sementara tersebut di mana pembatalan tersebut berkuat kuasa dari tarikh surat tersebut ('keputusan pertama responden'). Selanjutnya, responden telah mengeluarkan notis dalam 'Borang D' bertarikh 29 Ogos 2018 ('Borang D') di bawah Akta Perancangan Bandar dan Desa 1976 ('TCPA') dan Jadual ke 4 Peraturan Pengendalian Perancangan (Umum) (Selangor) 2001, kepada pemilik tanah untuk mengembalikan tanah tersebut kepada keadaan asal sehingga tanah tersebut dapat digunakan sebagaimana yang dikehendaki oleh syarat-syarat nyata. Terdapat juga laporan di akhbar *Star* pada 27 September 2018 mengenai kemalangan tersebut. Responden juga telah menolak rayuan pemohon untuk, antara lain, mengoperasikan kilang pemohon ('keputusan kedua responden'). Terkilan dengan keputusan-keputusan responden, pemohon memfailkan permohonan semakan kehakiman ('lampiran 21') untuk relif-relif berikut: (a) perintah certiorari untuk membatalkan keputusan-keputusan responden dan Borang D; (b) perisytiharan bahawa keputusan-keputusan responden tidak sah; dan (c) perintah untuk responden membayar ganti rugi kepada pemohon. Isu-isu yang dibangkitkan adalah: (i) sama ada penerbitan surat khabar *Star* tersebut merupakan keterangan dengar cakap yang tidak dapat diterima di bawah A 41 k 5(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'); (ii) sama ada lampiran 21 menjadi akademik kerana lesen sementara telah tamat selepas 31 Januari 2019; (iii) sama ada arahan responden dikeluarkan secara sah: (iv) sama ada Borang D sah; (v) sama ada keputusan-keputusan responden adalah sah; (vi) sama ada terdapat ketidakaturan prosedur mengenai arahan responden, keputusan-keputusan responden dan Borang D; (vii) sama ada keputusan-keputusan responden dan Borang D tidak rasional; (viii) sama ada responden telah bertindak dengan niat buruk dan/atau berniat jahat; (ix) sama ada mahkamah harus menggunakan budi bicara untuk memberikan relif-relif yang dipohon; dan (x) sama ada responden bertanggungjawab membayar ganti rugi kepada pemohon.

Diputuskan, menolak lampiran 21 dengan kos:

(1) Pemohon tidak mematuhi peraturan umum yang ditetapkan dalam A 41 k 5(1) KKM dengan tidak memfailkan afidavit oleh penulis mengenai kebenaran kandungan laporan surat khabar *Star*. Laporan tersebut

merupakan keterangan dokumentari dengar cakap. Empat pengecualian di bawah A 14 k 2(2), A 14 K 4(2), A 38 k 3(1) dan A 41 k 5(2) KKM tidak terpakai untuk menerima masuk laporan akhbar *Star* sebagai keterangan dalam kes ini. Oleh itu, mahkamah menolak penerimaan laporan akhbar *Star* tersebut walaupun responden tidak membantah penerimaan keterangan tersebut (lihat perenggan 26–27 & 69).

(2) Lesen sementara akan terbatal selepas 31 Januari 2019. Oleh itu, lampiran 21 telah menjadi akademik semata-mata selepas 31 Januari 2019 kerana tidak ada 'kontroversi yang sebenar' antara pemohon dan responden yang akan mempengaruhi mereka dengan cara apa pun (lihat perenggan 32 & 69).

(3) Responden secara sah menggunakan kuasa budi bicaranya untuk: (a) membuat arahan responden di bawah ss 86(a) dan 87(1) Akta Jalan, Parit dan Bangunan 1974 ('AJPB'); ss 80, 81(a), 82(1) dan 101(v) Akta Kerajaan Tempatan 1976 ('AKT'); dan/atau undang-undang kecil 43(1)(b) Undang-Undang Kecil Pelesenan Tred, Perniagaan dan Industri (Majlis Bandaraya Shah Alam) 2007 ('undang-undang kecil'); (b) mengeluarkan Borang D menurut s 27(8) TCPA; dan (c) membuat keputusan responden berdasarkan ss 80 dan 101(v) AKT; dan/atau undang-undang kecil 10(1)(c) (lihat perenggan 39, 48, 50 & 69).

(4) Seperti yang dinyatakan dalam lesen sementara, responden berhak membatalkan lesen sementara tersebut pada bila-bila masa tanpa memberikan alasan. Oleh itu, responden tidak diwajibkan dalam undang-undang untuk memberikan hak pendengaran kepada pemohon sebelum mengeluarkan arahan responden dan keputusan pertama responden. Berkenaan dengan keputusan kedua, keputusan tersebut dibuat setelah responden mempertimbangkan tiga representasi oleh pemohon, oleh itu, tidak terdapat ketidakaturan prosedur mengenai keputusan kedua responden (lihat perenggan 52–53 & 69).

(5) Keputusan-keputusan responden dan Borang D adalah rasional kerana: (a) keputusan-keputusan responden dan Borang D telah dibuat setelah responden mempertimbangkan semua perkara yang relevan; (b) responden tidak mengambil kira perkara yang tidak relevan dalam pengeluaran keputusan-keputusan tersebut dan Borang D; dan (c) keputusan-keputusan responden dan Borang D tidaklah begitu tidak rasional dan/atau tidak masuk akal sehingga keputusan tersebut tidak pernah dikeluarkan oleh pihak berkuasa tempatan yang munasabah (lihat perenggan 58–60 & 69).

(6) Niat jahat dan/atau niat buruk di pihak berkuasa awam bukanlah alasan bebas untuk semakan kehakiman ke atas keputusan pihak berkuasa awam tetapi dapat menyokong semakan kehakiman atas keputusan pihak berkuasa awam di bawah alasan ketidaksahan dan/atau tidak

rasional. Berdasarkan s 114(e) Akta Keterangan 1950 ('AK'), pemohon mempunyai beban undang-undang untuk memuaskan mahkamah atas imbangan kebarangkalian bahawa responden telah bertindak dengan niat buruk dan/atau dengan niat jahat mengenai keputusan responden dan Borang D. Berdasarkan penemuan mahkamah sebelum ini berkaitan dengan tidak rasional dan ketidaksahan, mahkamah berpuas hati bahawa pemohon telah gagal melaksanakan tanggungjawab untuk menolak anggapan di bawah s 114(e) AK bahawa responden telah bertindak dengan niat buruk dan/atau dengan niat jahat berhubung dengan keputusan-keputusan responden dan Borang D (lihat perenggan 61–64 & 69).

(7) Jikapun diibaratkan terdapat kesalahan, ketidakaturan prosedur dan/atau tidak rasional dalam kes ini, mahkamah tetap enggan menggunakan budi bicaranya untuk memberikan relif-relif yang dipohon dengan alasan berikut: (a) kesan buruk tersebut; (b) kemungkinan risiko kepada kesihatan awam dan keselamatan awam pekerja pemohon, pelajar, penduduk, dan alam sekitar; (c) pelanggaran berterusan terhadap syarat-syarat nyata; dan (d) kesalahan di bawah TCPA (lihat perenggan 65 & 69).

(8) Responden tidak bertanggungjawab untuk membayar ganti rugi kepada pemohon kerana imuniti yang diberikan kepada responden oleh s 95(2) AJPB; dan berdasarkan A 53 k 5(1)(b) KKM iaitu walaupun pemohon telah menuntut ganti rugi daripada responden dalam saman, mahkamah dalam saman tersebut tidak akan memerintahkan ganti rugi dibayar oleh responden kepada pemohon (lihat perenggan 66–69).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (folld)

Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia, pencelah) and another case [2018] MLJU 1288; [2018] 10 CLJ 129, FC (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, FC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)

Moo Hon Yee v S Abdul Rahman bin PAK Shaik Abdul Kader [2018] MLJU 1822; [2019] 2 AMR 399, HC (refd)

R v Ealing London Borough, ex p Times Newspapers Ltd (1865) 85 LGR 316, QBD (folld)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Syed Shaharul bin Mohamed Nasir & Anor v Pentadibir Tanah Daerah Kelang & Anor [2020] MLJU 401, HC (refd)

A *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973; [2016] 5 MLRH 651, HC (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, HC (refd)

Legislation referred to

B Evidence Act 1950 s 114(e)
Interpretation Acts 1948 and 1967 s 23(1)
Licensing of Trades, Businesses and Industries (Shah Alam City Council) By-Laws 2007 by-laws 2, 10(1)(c), 16(1), 43(1)(b)
C Local Government Act 1976 ss 2, 3, 80, 81(a), 82(1), 101(v)
National Land Code ss 89, 89(b), 109(2)(a), 127(1)(a), (1)(b), (1A)(a), (1A)(b)
Planning Control (General) (Selangor) Rules 2001 Schedule 4, Form D
Public Libraries and Museums Act 1964 [UK]
D Rules of Court 2012 O 14 rr 2(2), 4(2), O 38 r 3(1), O 41 r 5, 5(1), (2), O 53 rr 2(3), (4), 5(1), 5(1)(b)
Street, Drainage and Building Act 1974 ss 1(2), 3, 86(a), 87(1), 95(2)
Town and Country Planning Act 1976 ss 2(1), 5(1), 19(1), 26(1)(b), 27, 27(1), (8), (9), (11)

E *Ramesh a/l Supramaniam (Chambers of Ramesh) for the applicant.*
Siti Maspuah bt Maulan (Norazalina bt Hairuddin with her) (Maulan & Co) for the respondent.

F **Wong Kian Kheong J:**

A. BACKGROUND

G **[1]** On 28 December 2015, the applicant company ('applicant') applied to the respondent ('respondent') for a temporary license (*lesen sementara*) to operate an ice-making factory ('applicant's factory') at Lot 912A, Jalan Nagasari 36/10, Section 36, 40470 Shah Alam, Selangor Darul Ehsan ('land').

H **[2]** The land is owned by Dato' Sri Pathmanabhan a/l Mannar ('land owner'). The land owner is a director of the applicant.

[3] According to the register document of title of the land:

(a) the land is subject to a category of land use of agriculture ('category of land use (agriculture)'); and

I (b) there is an express condition that the land can only be used for the cultivation of 'general crops' (*tanaman am*) ('express condition').

[4] On 28 January 2016, the respondent granted a temporary license for the operation of the applicant's factory until 31 January 2017 ('temporary license'). A

[5] Upon the applicant's application, the respondent renewed the temporary license every year until 31 January 2019. B

[6] The temporary license stated that the respondent was entitled to suspend or revoke the temporary license at any time without any reason and payment of damages (*MBSA (respondent) berhak menggantung atau membatalkan lesen sementara ini pada bila-bila masa tanpa sebarang alasan dan bayaran ganti rugi*). C

[7] On 13 August 2018, there was a leakage of 'Ammonia Gas' at the applicant's factory ('accident') which caused the death of two applicant's employees of Indian nationality ('two deaths'). D

[8] In view of the accident, the respondent issued a notice on 14 August 2018 to the applicant which directed the applicant to stop operation and to close the applicant's factory with immediate effect ('respondent's direction'). E

[9] The respondent sent a letter dated 17 August 2018 to the applicant ('respondent's letter (17 August 2018)') which stated, among others, as follows:

(a) it was found that the applicant's factory was involved in the pollution of the environment as a result of the accident; F

(b) the accident had caused death and injury to the applicant's workers;

(c) the leakage of ammonia gas had serious repercussions and caused anxiety to the local community and students. This is because the applicant's factory is in a residential area; G

(d) the respondent took a serious view of the accident and was of the opinion that the operations of the applicant's factory was not appropriate in the area in question. Hence, the respondent had decided to revoke the temporary license with effect from the date of the respondent's letter (17 August 2018) ('respondent's first decision'); H

(e) the applicant could appeal in writing against the respondent's first decision within 14 days from the date of the respondent's letter (17 August 2018) ('14 days period') and to provide an explanation why the temporary license should not be revoked; and I

(f) the applicant would be deemed to have agreed with the respondent's first decision if the respondent did not receive the applicant's written appeal after the expiry of the 14 days period.

[10] On 23 August 2018, the applicant's consultant, AG Alchemy Consultancy Sdn Bhd ('AGAC'), had appealed in writing on behalf of the applicant against the respondent's first decision ('applicant's first representation').

[11] By a letter dated 29 August 2018 from AGAC to the respondent, AGAC submitted on behalf of the applicant, a report entitled 'Incident assessment of existing ice manufacturing plant and submission of Risk Assessment Report' ('applicant's second representation').

[12] Under the Town and Country Planning Act 1976 ('the TCPA') and Schedule 4 to Planning Control (General) (Selangor) Rules 2001, the respondent issued a notice in 'Form D' dated 29 August 2018 (Form D) to the land owner to reinstate the land to its original state (before the building of the applicant's factory) so that the land could be used as required by the express condition.

[13] On behalf of the applicant, AGAC submitted 'Financial and Damages Evaluation Report' to the respondent on 5 September 2018 ('applicant's third representation').

[14] The respondent sent a letter dated 24 September 2018 to the applicant ('respondent's letter (24 September 2018)'). According to the respondent's letter (24 September 2018):

(a) the respondent invited the applicant to attend a meeting which would be held at the respondent's office on 1 October 2018 ('meeting (1 October 2018)');

(b) the meeting (1 October 2018) would discuss the accident; and

(c) the minutes of a meeting dated 20 August 2018 ('meeting minutes (20 August 2018)') were enclosed in the respondent's letter (24 September 2018).

[15] The applicant claimed that the meeting minutes (20 August 2018) had not been enclosed in the respondent's letter (24 September 2018).

[16] The 'Star' newspaper reported on 27 September 2018 ('*Star* newspaper report'), among others, that the following statements had been made by 'Datuk Bandar Shah Alam', Datuk Ahmad Zaharin Mohd Saad ('DBSA'):

(a) the applicant's factory had three months to vacate the land because a decision had been made by Selangor's 'Executive Council' ('EXCO') and the applicant had been notified of such a decision;

(b) the applicant's factory was located in a residential area and would have to relocate;

(c) the respondent gave a temporary license for the applicant's factory to operate but the respondent was not informed that ammonia was used in the applicant's factory;

(d) the respondent had revoked the temporary license and all operations at the applicant's factory had ceased;

(e) the applicant's factory was located opposite a school;

(f) the respondent had no expertise to handle 'ammonia cases' which should fall under the purview of the Department of Occupational Safety and Health ('DOSH'); and

(g) DBSA 'preferred' the applicant's factory to be relocated as this would ensure the safety of residents living near the applicant's factory.

[17] At the meeting (1 October 2018):

(a) the applicant was given a copy of the agenda for the meeting (1 October 2018) ('meeting agenda (1 October 2018)'). Paragraph 4 of the meeting agenda (1 October 2018) stated 'Proposed Decision of meeting' (*Cadangan Keputusan Mesyuarat*); and

(b) the applicant was handed a copy of a letter dated 28 September 2018 from the respondent to AGAC ('respondent's letter (28 September 2018)') which stated, among others, as follows:

(i) the respondent's Licensing Department (*Jabatan Pelesenan*) had forwarded a report regarding the accident to:

(1) a meeting of the respondent's 'Jawatankuasa Bertindak Hal Ehwal Pelesenan' which was held on 13 September 2018; and

(2) a meeting of the respondent's 'Jawatankuasa Kawalan Perniagaan dan Kesihatan' which was convened on 19 September 2018;

(ii) the EXCO had met on 23 August 2018 and agreed that:

(1) the applicant should relocate its ammonia tank on an urgent basis (*kadar segera*); and

(2) the relocation should be completed within three months from the date of the respondent's decision in this case (EXCO's decision); and

(iii) in the circumstances, the respondent rejects the applicant's appeal to, among others, operate the applicant's factory ('respondent's second decision').

B. JUDICIAL REVIEW APPLICATION

[18] In court encl No 1, the applicant applied ex parte for leave of court to seek the following orders, among others:

(1) an order of certiorari to quash:

(a) the respondent's first decision and respondent's second decision ('respondent's two decisions'); and

(b) Form D;

(2) a declaration that the respondent's two decisions are invalid;

(3) an order for the respondent to pay damages to the applicant; and

(4) a stay of the enforcement of a part of the respondent's second decision which required the relocation of the applicant's factory within three months from the date of the respondent's second decision ('stay application').

[19] Vazeer Alam Mydin Meera J (as he then was) directed the stay application to be heard inter partes and gave leave for the applicant to seek the relief as stated in the above sub-paras 18(1)–(3) ('relief'). Consequently, the applicant filed an inter partes judicial review application for the relief in court encl No 21 ('encl 21').

[20] After hearing the applicant and respondent, on 27 May 2019, Vazeer J dismissed the stay application with costs. The applicant did not appeal to the Court of Appeal against this decision.

C. ISSUES

[21] When I took over this court from Vazeer J and after I had perused all the cause papers regarding encl 21, I posed the following two questions to learned counsel for the applicant and respondent ('two questions'):

(a) as the applicant has not filed an affidavit in this case by the authoress of the *Star* newspaper report, Ms Priya Menon ('authoress'), whether the contents of the *Star* newspaper report constitute hearsay evidence which is not admissible under O 41 r 5(1) of the Rules of Court 2012 ('the RC'). In this regard, can the failure of the respondent or even the negligence of the respondent's learned counsel to object to the admissibility of the *Star* newspaper report, admit the *Star* newspaper report as evidence in this case? and

(b) if not because of the accident, the respondent's direction and respondent's two decisions, the temporary license would have lapsed on 31 January 2019. Consequently, has encl 21 become purely academic in this case?

[22] After I had posed the two questions, I gave learned counsel for the applicant and respondent a right to file supplemental written submission regarding the two questions. I also gave both learned counsel a right to submit orally in respect of the two questions. This course of action is taken because both parties in encl 21 have a right under the second rule of natural justice to be heard before this court decides on the effect of the two questions (if any) on encl 21 which have been raised by the court (not by the parties) — please see *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973; [2016] 5 MLRH 651 at [11(2)].

[23] In addition to the two questions, the following issues arise in encl 21:

(a) whether the respondent had exercised its discretionary power lawfully to:

(i) give the respondent's direction under:

(1) ss 86(a) and 87(1) of the Street, Drainage and Building Act 1974 ('the SDBA');

(2) ss 80, 81(a), 82(1) and 101(v) of the Local Government Act 1976 ('the LGA'); and/or

(3) by-law 43(1)(b) ('by-law 43(1)(b)') of theLicensing of Trades, Businesses and Industries (Shah Alam City Council) By-Laws 2007 ('By-Laws').

The relationship between SDBA, LGA and By-Laws as provided in s 23(1) of the Interpretation Acts 1948 and 1967 ('the IA') will be discussed in this case;

(ii) issue Form D pursuant to s 27(8) of the TCPA; and

(iii) make the respondent's two decisions under:

(1) ss 80 and 101(v) of the LGA; and/or

(2) by-law 10(1)(c) of the By-Laws ('by-law 10(1)(c)');

(b) was there procedural impropriety in respect of Form D and respondent's two decisions? This issue discusses the effect of the temporary license which has expressly provided that the respondent is entitled to revoke the temporary license at any time without giving any reason;

(c) whether Form D and respondent's two decisions were 'irrational' in the following sense:

(i) the respondent's two decisions and Form D had been made by the respondent without a consideration of all relevant matters;

(ii) the respondent had taken into account an irrelevant matter in the issuance of the respondent's two decisions and Form D; and/or

(iii) Form D and respondent's two decisions were so irrational and/or so unreasonable that no reasonable local authority would have ever made;

(d) whether bad faith and/or malice regarding a public authority's decision:

(i) constitutes an independent ground for the court to review the decision; or

(ii) falls within the grounds of 'illegality' and/or 'irrationality' for a judicial review of the decision.

In this case, did the respondent act in a mala fide manner with regard to the respondent's two decisions and Form D?

(e) whether the applicant has rebutted the rebuttable presumption under s 114(e) of the Evidence Act 1950 ('the EA') that the respondent's exercise of discretionary power regarding the respondent's two decisions and Form D has been 'regularly performed';

(f) should the court exercise its discretion to grant orders of certiorari and declaration in this case? and

(g) whether the court can order the respondent to pay damages to the applicant. This issue discusses the application of s 95(2) of the SDBA (which confers immunity on, among others, local authorities) and O 53 r 5(1)(b) of the RC.

D. WHETHER STAR NEWSPAPER PUBLICATION CONSTITUTES HEARSAY EVIDENCE WHICH IS INADMISSIBLE UNDER O 41 R 5(1) OF THE RC

[24] O 41 r 5 of the RC provides as follows:

> *Contents of affidavit*
>
> O 41 r 5(1) *Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*
>
> (2) *An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds hereof.* (Emphasis added.)

[25] In *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621 at para [16(2)], I have decided as follows:

[16(2)] ... *Order 41 r 5(1) of the RC provides that an affidavit may contain only such facts as the deponent of the affidavit is able of his or her own knowledge to prove. In the Singapore High Court case of Wong Hong Toy & Anor v Public Prosecutor* [1988] 2 MLJ 553 *at p 557, Lai Kew Chai J held that O 41 r 5(1) of the then Singapore's Rules of the Supreme Court 1970 (RSC (Singapore)) 'enshrines the evidentiary rule against the admission of hearsay evidence'. Order 41 r 5 RSC (Singapore) is similar to our O 41 r 5 of the RC.*

Order 41 r 5(1) and (2) of the RC provide 4 exceptions wherein an affidavit may contain hearsay evidence, namely when there is an application of the following:

(a) *Order 14 rule of the 2(2) RC*;

(b) *Order 14 rule of the 4(2) RC*;

(c) *Order 41 rule of the 5(2) RC*; *and*

(d) *a Court order has been made under Order 38 rule of the 3(1) RC.*

(Emphasis added.)

The appeal to the Court of Appeal against the decision in *Tokai Corporation* has been withdrawn.

[26] Learned counsel for the applicant had the candour to admit that no affidavit from the authoress had been filed by the applicant regarding the truth of the contents of the *Star* newspaper report. The deponent of the applicant's affidavit which exhibited the *Star* newspaper report was not able of his own knowledge to prove the truth of the contents of the *Star* newspaper report. Accordingly, the *Star* newspaper report constituted documentary hearsay evidence and cannot be admitted by reason of O 41 r 5(1) of the RC ('general rule').

[27] The following four exceptions to the general rule ('four exceptions') do not apply:

(a) O 14 rr 2(2), 4(2) and O 38 r 3(1) of the RC do not apply to the *Star* newspaper report; and

(b) O 41 r 5(2) applies only to 'interlocutory proceedings'. Enclosure 21 applies for relief which is final in effect. Hence, the applicant cannot rely on O 41 r 5(2) of the RC to admit the *Star* newspaper report as evidence in this case.

[28] The applicant's learned counsel has attempted to persuade this court to admit the *Star* newspaper report as evidence on the ground that the respondent's learned counsel has not objected to the admissibility of the *Star* newspaper report. According to the applicant's learned counsel, the respondent's failure to object to the admissibility of the *Star* newspaper report,

A is tantamount to a waiver which is a ground to admit the *Star* newspaper report as evidence in this case.

[29] I am not able to accept the above submission of the applicant's learned counsel. My reasons are as follows:

B

(a) it is trite law that a party's failure to object to inadmissible evidence, does not admit such inadmissible evidence. I rely on the following judgment of the Federal Court delivered by Edgar Joseph Jr FCJ in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 221:

C

> *Now, this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.* (Emphasis added.)

D

(b) the question of admissibility of a piece of evidence is a question of law to be decided by the court and not by the parties. If a party's learned counsel has been negligent in not objecting to the admissibility of a piece of inadmissible evidence, the court is nevertheless duty bound to reject such inadmissible evidence as a matter of law. In any event, a party should not be penalised for the negligence of the party's learned counsel.

E

E. HAS ENCL 21 BECOME PURELY ACADEMIC?

F

[30] It is not disputed that the court has a discretion to grant relief in a substantive judicial review application — please refer to the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 393.

G

[31] If an application to the court has become purely academic, the court should not exercise its discretion in vain to allow the application but should instead dismiss the application. I cite a judgment of the Federal Court in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia, pencelah) and another case* [2018] MLJU 1288; [2018] 10 CLJ 129 at paras [49] and [51], as follows:

H

> *The Constitutional Questions Rendered Academic*
>
> ...
>
> [49] *But what of the general rule?*
>
> *The general principle is that the court does not answer academic questions. The leading case is Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 *at pp 113–114, per Viscount Simon LC*:
>
> > *The difficulty is that the terms thus put on the appellant by the Court of Appeal are*

I

such as make it a matter of complete indifference to the respondents whether the appellant wins or loses; the respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possess to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without any way affecting the position between the parties.

...

[51] *The position is well-established in Malaysia (see for instance Datuk Syed Kechik Syed Mohamed & Anor v The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 MLJ 257; [1999] 1 CLJ 325*). The meaning of 'academic' was explained in Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 *at [7], per Augustine Paul FCJ*:

The test therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. (Emphasis added.)

[32] The temporary license would have lapsed after 31 January 2019 and the applicant had to apply to the respondent for a renewal of the temporary license on or after 1 February 2019. Without a temporary license, the applicant's factory cannot be operated on the land. It is thus clear that after 31 January 2019 encl 21 has become purely academic because there is no 'matter in actual controversy between the parties which will affect them in some way' within the meaning of the Federal Court's judgment delivered by Augustine Paul FCJ in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 at para [7]. On this ground alone, encl 21 is dismissed with costs.

[33] In the event that I have erred in deciding that encl 21 has become purely academic, I will now proceed to decide on the issues raised by the parties in this case.

F. GROUNDS FOR JUDICIAL REVIEW

[34] Raus Sharif FCJ (as he then was) delivered the following judgment of the Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, at [15] and [19]:

[15] ... *Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative*

law. Rama Chandran is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

...

[19] *It is clear from the above authorities that the scope and ambit of Rama Chandran had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review*. (Emphasis added.)

[35] Based on *Ranjit Kaur*:

(a) there are only three established heads of judicial review, namely 'illegality', 'procedural impropriety' and 'irrationality'; and

(b) Malaysian case law has not recognised 'disproportionality' as a fourth ground for judicial review.

[36] I am of the view that bad faith and/or malice is not a separate ground for the court to review a decision of public authorities. Having said that, public authorities are duty bound to act lawfully and in good faith. If a decision of a public authority is tainted with mala fides and/or malice, such a decision, in my opinion, *may* be:

(a) illegal; and/or

(b) irrational

— which supports a judicial review of the decision.

For the above view, I rely on the judgment of the United Kingdom's (UK) Divisional Court in *R v Ealing London Borough, ex p Times Newspapers Ltd* (1865) 85 LGR 316 ('Times Newspapers'). In *Times Newspapers*:

(a) the respondent local councils imposed a ban ('ban') on certain newspapers ('banned newspapers') in public libraries ran by the respondent local councils under the Public Libraries and Museums Act 1964 ('UK Statute');

(b) the applicants (the printers and publishers of the banned newspapers) applied for a judicial review of the ban;

(c) the ban was imposed solely due to the support of the respondent local councils for employees of the applicants (members of trade unions) who had been dismissed by the applicants; and

(d) the Divisional Court granted, among others, a certiorari to quash the ban on the ground, among others, that the ban was illegal for infringing the UK Statute and was also irrational. It is decided by Watkins LJ (as he then was) at para [49], as follows:

> [49] *I am of the opinion that the ban imposed by the respondents was for an ulterior object. It was inspired by political views which moved the respondents to interfere in an industrial dispute and for that purpose to use their powers under this Act. Parliament, I am sure, did not contemplate such action as that to be within the power it conferred when it enacted s 7. I would go so far as to say that no rational local authority would for a moment have thought that such a ban was open to it to impose in discharge of its duty to service libraries. That the respondents took account of an irrelevant consideration has I think been clearly demonstrated*. (Emphasis added.)

G. 'LEGALITY' OF THE RESPONDENT'S DIRECTION, FORM D AND RESPONDENT'S TWO DECISIONS

[37] In this case, the accident had caused:

(a) two deaths; and

(b) a leakage of ammonia gas which:

(i) endangered the lives of :

(1) residents in the vicinity of the applicant's factory ('residents'); and

(2) students of Sekolah Menengah Jenis Kebangsaan Chung Hwa ('students') at No 1, Jalan Nagasari 36/10, Section 36, 40470 Shah Alam ('school'). The school is only about 250 meters from the applicant's factory; and

(ii) pollute the air specifically and the environment generally ('adverse effect (accident)')).

G(1). Could the respondent's direction be lawfully issued?

[38] Enclosure 21 did not challenge the legality of the respondent's direction. However, in view of the public importance of this case regarding the validity of a local authority's decision in respect of the accident, I will discuss the validity of the respondent's direction.

[39] Firstly, I am of the view that the respondent has discretionary powers to make the respondent's direction under the following written law:

(1) SDBA applies to West Malaysia (s 1(2) of the SDBA). The respondent is a 'local authority' (as defined in s 3 of the SDBA) which has been conferred discretionary powers under SDBA.

Section 3 of the SDBA has defined 'nuisance' as follows:

> 'nuisance' means any act, omission or thing occasioning or likely to occasion injury, annoyance, offence, harm, danger or damage to the sense of sight, smell or hearing, or which is or is likely to be injurious or dangerous to health or property; (Emphasis added.)

The applicant's factory falls within the definitions of 'building' and 'premises' in s 3 of the SDBA. It is clear that the adverse effect (accident) constitutes a 'nuisance' as defined in s 3 of the SDBA. Once there is a nuisance, the respondent has the following statutory powers under ss 86(a) and 87(1) SDBA:

> 86 *Nuisances liable to be dealt with summarily under this Act.*
>
> *For the purposes of sections 87*, 88, 89 and 90:
>
> ...
>
> (a) *any premises* or part thereof of such a construction or *in such a state as to be a nuisance or injurious or dangerous to health*;
>
> ...
>
> *shall be a nuisance liable to be dealt with summarily in accordance with sections 87*, 88, 89 and 90.
>
> 87 *Notice requiring abatement of nuisance.*
>
> (1) *On receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default or sufferance the nuisance arises* or continues or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, *requiring him to abate the same within the time specified in the notice* to execute such works and do such things as are necessary for that purpose and, if the local authority thinks it desirable, specifying any works to be executed. (Emphasis added.)

In view of the adverse effect (accident), the respondent is clearly correct in the exercise of its discretionary power under ss 86(a) and 87(1) of the SDBA to issue the respondent's direction;

(2) the respondent is a 'City Council' and 'local authority' as defined in s 2 of the LGA. The applicant's factory constitutes a 'building' within the meaning of s 2 of the LGA. The adverse effect (accident) would fall within the following definition of 'nuisance' in s 3 of the LGA:

> *'nuisance' means any act, omission or thing occasioning or likely to occasion injury,*

annoyance, offence, harm, danger or damage to the sense of sight, *smell* or hearing *or which is or is likely to be injurious or dangerous to health* or property *or which affects the safety* or the rights *of the inhabitants at large*; (Emphasis added.)

As a result of adverse effect (accident), the respondent was empowered to issue the respondent's direction under ss 80, 81(a), 82(1) and 101(v) of the LGA. I reproduce below ss 80, 81(a), 82(1) and 101(v) of the LGA:

80 *Nuisances to be abated.*

The local authority shall take steps to remove, put down and abate all nuisances of a public nature within the local authority area on public or *private premises and may proceed at law against any person committing any such nuisances for the abatement thereof* and for damages.

81 *Nuisances liable to be dealt with summarily under this Act.*

For the purposes of this Act —

(a) *any premises* or part thereof of such a construction or *in such a state as to be a nuisance*;

...

shall be liable to be dealt with summarily under this Act.

82 *Notice requiring abatement of nuisance.*

(1) *On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default or sufferance the nuisance arose* or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance exists, *requiring him to abate the same within the time specified in the notice* and to execute such works and do such things as are necessary for that purpose and, if the local authority thinks it desirable, specifying any works to be executed.

101 *Further powers of local authority.*

In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely —

...

(v) *to do all things necessary for or conducive to the public safety, health* and convenience; ... (Emphasis added.); and

(3) by-law 43(1)(b) provides as follows:

43 *Power to close*

(1) Without prejudice to the exercise of the powers conferred on him under by-laws 36 and 37, *the Licensing Authority may, forthwith take such steps as he*

A *may consider necessary to close any licensed premises if he is satisfied that —*

...

(b) *such closure is necessary for or conducive for the public interest*; or ... (Emphasis added.)

B

According to by-law 2 of the By-Laws ('by-law 2'), 'Licensing Authority' means, among others, DBSA. The temporary license in this case was issued for the applicant's factory pursuant to by-law 16(1) of the By-Laws. In view of the temporary license, the land constitutes 'licensed premises' as defined in by-law C 2 (*any premises operating any activity of trade, business or industries licensed by the Licensing Authority under these By-Laws*).

As a result of the adverse effect (accident), the respondent has a discretionary D power under by-law 43(1)(b) to issue the respondent's direction which 'is necessary for or conducive for the public interest'.

[40] A subsidiary legislation cannot confine the scope of an Act of Parliament ('AP'). If a delegated legislation fetters the operation of an AP, this E means that the delegated legislation is inconsistent with the AP and by virtue of s 23(1) of the IA, the delegated legislation is void to the extent of such an inconsistency. Section 23(1) of the IA states as follows:

23 (1) *Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the* F *inconsistency.* (Emphasis added.)

Based on s 23(1) of the IA, by-law 43(1)(b) cannot restrict the respondent's discretionary powers conferred by:

G (a) ss 86(a) and 87(1) of the SDBA; and

(b) ss 80, 81(a), 82(1) and 101(v) of the LGA.

G(2). Was Form D valid?

H

[41] I have to point out that Form D is issued by the respondent to the land owner and not to the applicant. It is trite law that a company is a legal entity which is separate from the company's directors, shareholders and employees. The applicant is however entitled to file encl 21 regarding Form D because the I applicant is 'adversely affected' by Form D within the meaning of O 53 r 2(4) of the RC.

[42] I reproduce below the relevant parts of ss 89, 109(2)(a), 127(1)(a), (1)(b), (1A)(a) and (1A)(b) of the National Land Code ('the NLC'):

89 Conclusiveness of register documents of title

Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —

(a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

(b) *of the conditions*, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, *so far as the same are required by any provision of this Act to be specified to referred to in that document*.

109 *Conditions*, etc, *applicable on alienation*.

(2) *Land to which this section applies shall become subject on alienation to the following conditions* and restrictions in interest —

(a) *such express conditions* and restrictions in interest (if any) *as are then endorsed on the document of title thereto (or referred to therein), being conditions* and restrictions *imposed by the State Authority under the powers conferred by sections 120 to 122*; ...

127 *Liability to forfeiture for breach of condition*

(1) *Upon any breach arising of any condition to which any alienated land is for the time being subject —*

(a) *the land shall become liable to forfeiture to the State Authority, and*

(b) *except in a case where a fine is imposed under subsection (1A), or where action for the purpose of causing the breach to be remedied is first required to be taken under section 128, the Land Administrator shall proceed with the enforcement of the forfeiture in accordance with the provisions of section 129*.

(1A)(a) *Upon any breach as is referred to in sub-section (1) arising, the Land Administrator may, instead of taking action under section 128 or 129, serve a notice in Form 7E upon the proprietor, requiring him to show cause why a fine should not be imposed in respect of such breach*.

(b) *Upon failure by the proprietor to show cause to the satisfaction of the Land Administrator, the Land Administrator may make an order for the payment of a fine of not less than five hundred ringgit, and in the case of a continuing breach, a further fine of not less than one hundred ringgit for each day during which the breach continues*. (Emphasis added.)

[43] Firstly, the express condition is conclusive under s 89(b) of the NLC and cannot be challenged by the applicant and land owner.

[44] Secondly, the construction of the applicant's factory on the land and its operation are clearly contrary to the category of land use (agriculture) and express condition. A breach of the express condition has adverse consequences as explained in *Moo Hon Yee v S Abdul Rahman bin PAK Shaik Abdul Kader* [2018] MLJU 1822; [2019] 2 AMR 399 at para [14], as follows:

A [14] *The express condition is conclusive under s 89(b) of the NLC. I am of the view that when the defendant operates a grocery shop on the Land, this breaches the express condition under s 109(2)(b) of the NLC (defendant's breach). The defendant's breach has the following adverse consequences for both the plaintiff and defendant*:

B (1) *both the plaintiff and defendant are liable to a fine by the LA under s 127(1A)(a) and (b) of the NLC*; *or*

(2) *the Land is liable to be forfeited to the State Authority pursuant to s 127(1)(a) and (b) of the NLC.* (Emphasis added.)

C **[45]** So long as the applicant's factory is situated on the land, there is a continuing breach of the express condition ('first continuing breach (express condition)').

D **[46]** I reproduce below the definitions of 'development' and 'planning permission' in s 2(1) as well as ss 19(1), 26(1)(b), 27(1), (8), (9) and (11) of the TCPA:

'development' means the carrying out of any building, engineering, mining, *industrial, or other similar operation* in, *on,* over, or under *land, the making of any material* E *change in the use of any land or building or any part thereof*, or the subdivision or amalgamation of lands; *and 'develop' shall be construed accordingly*;

...

'planning permission' means permission granted, with or without condition, to carry out F *development;*

19 *Prohibition of development without planning permission.*

(1) *No person, other than a local authority, shall commence, undertake, or carry out any development unless planning permission in respect of the development has been granted* G *to him under section 22 or extended under subsection 24 (3).*

...

26 *Offences relating to unauthorized development.*

(1) *A person who, whether at his own instance or at the instance of another person —*

H ...

(b) *commences, undertakes, or carries out, or permits to be commenced, undertaken, or carried out, any development in contravention of section 19* or 20;

...

I *commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both and, in the case of a continuing offence, to a further fine which may extend to five thousand ringgit for each day during which the offence continues after the first conviction for the offence*.

27 Enforcement in the case of contravention of section 19.

(1) *This section shall apply where it appears to the local planning authority that any development has been or is being undertaken or carried out in contravention of section 19.*

...

(8) *If no application is made under subsection (3) within the time allowed* or if the application is refused, *the local planning authority shall serve on the owner*, occupier, or the person who, in the opinion of the local planning authority, is carrying out the development, *a notice in the prescribed form requiring any or all of them to comply, within the period specified in the notice or within such further period as the local planning authority may allow, with such requirements, to be specified in the notice, as the local planning authority thinks fit in order that the land be restored as far as possible to the condition it was in before the development was commenced.*

(9) *Subject to subsection (10), any person who fails to comply with any requirement of a notice under subsection (2) or (8) within the period allowed commits an offence and is liable, on conviction, to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding six months or to both and to a further fine which may extend to five thousand ringgit for each day during which the failure is continued after the first conviction for the offence.*

...

(11) *In this section, 'development' includes any part or feature of a development.* (Emphasis added.)

[47] Section 19(1) of the TCPA provides that no person shall 'commence, undertake, or carry out' any 'development' (as defined in s 2(1) of the TCPA) unless the person has obtained 'planning permission' (as understood in s 2(1) of the TCPA) from the 'local planning authority' (defined in ss 2(1) and 5(1) of the TCPA to mean the local authority). In this case, no 'planning permission' has been obtained for the '*development*' (*the carrying out of any building ... industrial, or other similar operation*) of the land in respect of the construction of the applicant's factory and its subsequent operation. Accordingly, the applicant has breached s 19(1) of the TCPA which amounts to an offence under s 26(1)(b) of the TCPA ('offence (TCPA)'). It is to be emphasised that the applicant's breach under s 19(1) of the TCPA is still continuing ('second continuing breach (TCPA)').

[48] In view of the category of land use (agriculture), express condition and the adverse effect (accident), the respondent was empowered under s 27(8) of the TCPA to issue Form D. For the purpose of s 27 of the TCPA, 'development' includes any part or feature of development — please see s 27(11) of the TCPA.

[49] It is to be noted that any non-compliance with Form D constitutes an offence under s 27(9) of the TCPA.

G(3). Whether the respondent's two decisions are lawful

[50] I am of the view that the respondent's two decisions are lawfully made under:

(a) ss 80 and 101(v) pf the LGA; and/or

(b) by-law 10(1)(c). I reproduce below the relevant part of by-law 10(1)(c):

> 10 *Revocation of license*
>
> (1) *The Licensing Authority may revoke a license issued if satisfied that —*
>
> ...
>
> (c) *the licensee is operating trade, business or industries activity that can be harmful to public interest* or economy; ... (Emphasis added.)

I have no hesitation to uphold the validity of the respondent's two decisions pursuant to ss 80 and 101(v) of the LGA as well as by-law 10(1)(c). This decision is premised on the following reasons:

(i) the adverse effect (accident);

(ii) the safety and health of the applicant's employees, students and residents; and

(iii) the need to protect the environment.

[51] As explained in the above para 40, the contents of by-law 10(1)(c) cannot fetter the respondent's discretionary powers under ss 80 and 101(v) of the LGA.

H. WAS THERE 'PROCEDURAL IMPROPRIETY' REGARDING THE RESPONDENT'S DIRECTION, RESPONDENT'S TWO DECISIONS AND FORM D?

[52] As expressly stated in the temporary license, the respondent is entitled to revoke the temporary license at any time without giving any reason. The respondent is therefore not obliged in law to give a right of hearing to the applicant before issuing the respondent's direction and respondent's first decision. This is especially so in view of the adverse effect (accident), urgent need at the material time to safeguard the safety and health of the applicant's employees, students and residents as well as to protect the environment.

[53] The respondent's second decision was given after the applicant's first, second and third representations ('applicant's three representations') had been made to the respondent. In other words, the respondent's second decision was

made after the respondent had duly considered the applicant's 3 representations. Hence, there is no procedural impropriety regarding the respondent's second decision.

[54] Section 27(8) of the TCPA does not provide a right of hearing to the land owner or the applicant before Form D is issued by the respondent. In fact, s 27(8) of the TCPA employs a mandatory term 'shall' in that provision. Accordingly, Form D cannot be challenged on the ground that the applicant or the land owner is entitled to be heard before Form D is issued to the land owner.

I. ARE THE RESPONDENTS' TWO DECISIONS AND FORM D 'IRRATIONAL'?

[55] The applicant's learned counsel has contended that the respondent's two decisions and Form D have been made without due consideration of the following matters:

(a) there was a letter dated 9 October 2018 from the Fire and Rescue Department of Malaysia ('FRD') which stated the reading of ammonia inside and outside the applicant's factory ('FRD's letter');

(b) according to a letter dated 17 October 2018 sent by DOSH to the applicant, DOSH had no objection if the applicant's factory would resume operations provided that certain conditions were complied with by the applicant ('DOSH's letter');

(c) the following three letters had been sent to the respondent ('three letters') which stated that there was no objection to a resumption of the operations of the applicant's factory:

(i) letter dated 20 August 2018 from the chairman of 'Persatuan Penduduk Desa Latania';

(ii) letter dated 20 August 2018 from the chairman of 'Badan Pengurus Bersama Pangsapuri Seri Era Desa Latania'; and

(iii) letter dated 28 August 2018 from one Era Perumal, a resident at Lot 913, Jalan Nagasari 36/10, Section 36, 40460 Shah Alam;

(d) the applicant had expended a sum of RM21,743,902 as capital expenditure for the applicant's factory ('applicant's investment'); and

(e) due to the closure of the applicant's factory, the applicant suffers a total daily loss of RM55,500 a day ('applicant's total daily loss').

[56] As the authors of the three letters have not affirmed any affidavit regarding the truth of the contents of the three letters, by reason of the general

rule in O 41 r 5(1) of the RC (please see the above Part D), I cannot admit the three letters as evidence in encl 21.

[57] FRD's letter, DOSH's letter, applicant's investment and applicant's total daily loss had been forwarded to the respondent for the respondent's consideration.

[58] I am of the view that in making the respondent's two decisions, the respondent had considered all relevant matters (as stated in the above para 50). The adverse effect (accident), offence (TCPA) and second continuing breach (TCPA) fortify the respondent's two decisions. The respondent had a discretion to make the respondent's two decisions by preferring the reasons explained in the above para 50 over and above FRD's letter, DOSH's letter, applicant's investment and applicant's total daily loss. This is understandable because public health and public safety of the applicant's employees, students and residents as well as the protection of the environment shall override any private commercial interest, especially after the adverse effect (accident).

[59] In issuing Form D:

(a) the respondent had taken into account all relevant matters, especially the adverse effect (accident), offence (TCPA) and second continuing breach (TCPA); and

(b) DOSH's letter, applicant's investment and applicant's total daily loss cannot be relevant because if they are, any land can be:

(i) used contrary to its category of land use and/or express condition; and

(ii) developed (as understood in ss 2(1) and 27(11) of the TCPA) without the prior planning permission by the local planning authority.

[60] I do not find the respondent's two decisions and Form D to be so irrational and/or so unreasonable that no reasonable local authority would have issued.

J. DID THE RESPONDENT ACT IN BAD FAITH AND/OR MALICE IN THIS CASE?

[61] Section 114(e) of the EA provides as follows:

> 114 *Court may presume existence of certain fact*
>
> *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of* natural events, human conduct, and *public* and private *business, in their relation to the facts of the particular case*.

ILLUSTRATIONS

...

(e) that judicial and *official acts have been regularly performed*; (Emphasis added.)

By virtue of s 114(e) EA, the applicant (not the respondent) has the legal burden to satisfy this court on a balance of probabilities that the respondent has acted in bad faith and/or with malice regarding the respondent's two decisions and Form D.

[62] As discussed in the above para 36, the proof of a public authority's mala fides and/or with malice cannot constitute an independent ground for judicial review of the respondent's two decisions and Form D. Instead, proof of a public authority's bad faith and/or with malice regarding the public authority's decision, can support the contention that the decision may be illegal and/or irrational.

[63] In this case:

(a) Form D and respondent's two decisions are lawful (please see Parts G(2) and G(3) respectively);

(b) there is no procedural impropriety with regard to Form D and respondent's two decisions — please refer to the above Part H;

(c) Form D and the respondent's two decisions are rational (please refer to the above paras 58–60);

(d) the applicant is not entitled as a matter of right to the meeting minutes (20 August 2018); and

(e) the fact that:

(i) the meeting agenda (1 October 2018) stated the meeting (1 October 2018) would discuss the decision of the meeting (1 October 2018); and

(ii) the applicant was not given the respondent's letter (28 September 2018) (which contained the respondent's second decision) before the meeting (1 October 2018)

did not prove that the respondent's second decision had been made in bad faith and/or with malice.

[64] In any event, premised on the reasons explained in the above paras 50 and 58–60, I am satisfied that the applicant has failed to discharge the legal onus to rebut the presumption under s 114(e) of the EA that the respondent has acted in bad faith and/or with malice in respect of the respondent's two decisions and Form D.

A K. SHOULD THE COURT EXERCISE DISCRETION TO GRANT RELIEF IN THIS CASE?

[65] Even if it is assumed that the applicant has satisfied the court that there is illegality, procedural impropriety and/or irrationality in this case, I am not minded to exercise my discretion to grant any relief in encl 21 due to the following reasons:

(a) the adverse effect (accident);

(b) the possible risk to:

(i) public health and public safety of the applicant's employees, students and residents; and

(ii) the environment;

(c) the adverse effect (accident);

(d) the offence (TCPA); and

(e) the second continuing breach (TCPA).

L. WHETHER THE RESPONDENT IS LIABLE TO PAY DAMAGES TO APPLICANT

[66] I reproduce below s 95(2) SDBA, O 53 rr 2(3) and 5(1) of the RC:

95(2) SDBA *The* State Authority, *local authority* and any public officer or officer or employee of the local authority *shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act* or any by-laws made thereunder or by reason of the fact that such building works or the plans thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

O 53 r 2(3) *Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may* dismiss the application or *make any orders, including an order of* injunction or *monetary compensation*:

Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 Specific Relief Act 1950.

O 53 r 5(1) *Damages*

On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if —

(a) *he has included in the statement in support of his application for leave under*

rule 3 a claim for damages arising from any matter to which the application relates; and

(b) *the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages*. (Emphasis added.)

[67] As stated in the above sub-para 39(1), the respondent had exercised lawfully its discretionary powers under ss 86(a) and 87(1) of the SDBA in this case. This is the first reason why the respondent is not liable to pay any damages to the applicant.

[68] There is another reason why the court cannot award damages in the applicant's favour in this case. As explained in the above Parts E and G to K, there is no ground for judicial review of the respondent's two decisions and Form D. On the facts of this case, if the applicant has claimed damages by way of a civil suit against the respondent ('suit'), the court in the suit would not have allowed the suit and would not have ordered damages to be paid by the respondent to the applicant — please see *Syed Shaharul bin Mohamed Nasir & Anor v Pentadibir Tanah Daerah Kelang & Anor* [2020] MLJU 401 at para [34]. Hence, the respondent is not liable to pay damages to the applicant by virtue of O 53 r 5(1)(b) of the RC.

M. THE COURT'S DECISION

[69] Premised on the above reasons and evidence, encl 21 is dismissed with costs. A summary of this court's decision is as follows:

(a) the applicant did not comply with the general rule laid down in O 41 r 5(1) of the RC by not filing an affidavit by the authoress regarding the truth of the contents of the *Star* newspaper report. The four exceptions do not apply to admit the *Star* newspaper report as evidence in this case. Accordingly, the court rejects the admissibility of the *Star* newspaper report even though the respondent has not objected to the admissibility of such evidence;

(b) the temporary license would have lapsed after 31 January 2019. Hence, encl 21 had become purely academic after 31 January 2019 as there was no 'actual controversy' between the applicant and respondent which would affect them in any way;

(c) the respondent has lawfully exercised its discretionary powers to:

(i) make the respondent's direction under:

(1) ss 86(a) and 87(1) of the SDBA;

(2) ss 80, 81(a), 82(1) and 101(v) of the LGA; and/or

(3) by-law 43(1)(b);

(ii) issue Form D pursuant to s 27(8) of the TCPA; and

(iii) make the respondent's two decisions by virtue of:

(1) ss 80 and 101(v) of the LGA; and/or

(2) by-law 10(1)(c);

(d) there is no procedural impropriety regarding the issuance of the respondent's direction, respondent's two decisions and Form D;

(e) bad faith and/or malice on the part of a public authority:

(i) is not an independent ground for a judicial review of the public authority's decision; and

(ii) may support the judicial review of a public authority's decision on the ground of illegality and/or irrationality;

(f) the respondent's two decisions and Form D were rational because:

(i) the respondent's two decisions and Form D had been made after the respondent had considered all relevant matters;

(ii) the respondent had not taken into account an irrelevant matter in the issuance of the respondent's two decisions and Form D; and

(iii) the respondent's two decisions and Form D were not so irrational and/or so unreasonable that no reasonable local authority would have ever issued;

(g) the applicant has failed to rebut the presumption under s 114(e) of the EA to prove that the respondent has acted in bad faith and/or with malice with regard to the respondent's two decisions and Form D;

(h) even if it is assumed that there is illegality, procedural impropriety and/or irrationality in this case, based on the facts of this case the court will not exercise its discretion to grant any relief; and

(i) the respondent is not liable in damages to the applicant by reason of:

(i) the immunity conferred on the respondent by s 95(2) of the SDBA; and

(ii) O 53 r 5(1)(b) of the RC (even if the applicant has claimed damages from the respondent in a suit, the court in the suit would not have ordered damages to be paid by the respondent to the applicant).

[70] In closing, it is hoped that local authorities will exercise circumspection before granting a license, albeit a temporary one, to a business which may endanger public health, public safety and environment.

Enclosure 21 dismissed with costs.

Reported by Dzulqarnain bin Ab Fatar